



1 who appeared with counsel, and vocational expert Sharon N. Welter  
2 testified. (Tr. 600-649.) The ALJ determined a supplemental  
3 psychological evaluation was needed to develop the record further.  
4 (Tr. 644.) The new evidence was submitted to the ALJ on or about  
5 May 27, 2008. (Tr. 460-74.) On September 3, 2008, the ALJ denied  
6 benefits; the Appeals Council denied review. (Tr. 14-30, 4-6.) The  
7 instant matter is before this court pursuant to 42 U.S.C. § 405(g).

8 **STATEMENT OF THE CASE**

9 The facts of the case are set forth in detail in the transcript  
10 of proceedings and are briefly summarized here. At the time of the  
11 hearing, Plaintiff was 41 years old, single, and living with a  
12 friend in a hotel room. (Tr. 608, 614.) Plaintiff had a high  
13 school education and past work experience as an office assistant,  
14 bench grinder, stock clerk, solicitor, and telephone  
15 solicitor/customer service representative. (Tr. 82, 102, 640.) He  
16 reported his longest job was as an office assistant, which required  
17 lifting no more than ten pounds, walking one hour a day, standing  
18 one hour a day, sitting six hours a day, and no stooping, kneeling,  
19 crouching, reaching or crawling. He indicated he supervised 25-30  
20 people. (Tr. 103.) He testified he had a full right knee  
21 replacement in May 2005, (Tr. 127), and he has fallen many times  
22 since then due to his weak knee. (Tr. 631.) Plaintiff has a  
23 significant history of alcohol abuse, but testified he cut down  
24 because of his knee problems and now drinks "once in a while." (Tr.  
25 613-14.) He reported he is unable to sit for more than ten minutes  
26 without moving to stretch his knee. (Tr. 634.) He testified he can  
27 stand about ten minutes, walk about two and a half blocks, and lift

1 and carry about five to seven pounds. (*Id.*) He stated he could  
2 climb up stairs, but coming down stairs was a problem. (Tr. 636.)  
3 In addition to physical limitations due to his weak knee, Plaintiff  
4 said he is unable to remember anything. (Tr. 611.)

5 **ADMINISTRATIVE DECISION**

6 After summarizing the disability determination process used  
7 where there is medical evidence of a substance abuse disorder (20  
8 C.F.R. §§ 404.1535, 416.935), the ALJ proceeded with the first of  
9 two sequential evaluations: one with the effects of alcohol abuse  
10 and one without the effects of alcohol abuse. (Tr. 15-16.) At step  
11 one, ALJ Crickman found Plaintiff had not engaged in substantial  
12 gainful activity since February 1, 2004, the alleged onset date.  
13 (Tr. 17.) At step two, he found Plaintiff had the severe  
14 impairments of "right knee degenerative joint disease, status-post  
15 total right knee replacement in May 2005, and alcohol abuse." (*Id.*)  
16 In detailed findings, the ALJ determined the following conditions  
17 reported in the record were either non-severe or not established by  
18 the evidence: head injury, memory impairment, borderline  
19 intellectual functioning, depression, anxiety, somatoform disorder,  
20 and autistic disorder.<sup>1</sup> (Tr. 17-20.)

21 \_\_\_\_\_  
22 <sup>1</sup> It appears the January 2008 psychological evaluation signed  
23 by Jackie Hook, M.A., in which depression and an "autistic spectrum  
24 disorder" are diagnosed, relates to a different claimant and does  
25 not belong in Plaintiff's administrative record. (Tr. 475-78.)  
26 Therefore, the ALJ's findings relating to this report will not be  
27 reviewed on appeal.

1 At step three, he determined Plaintiff's impairments, alone or  
2 in combination, did not meet or equal the requirements of a listed  
3 impairment in 20 C.F.R., Part 404, Subpart P, Appendix 1 (Listings).  
4 (Tr. 20.) At step four, considering effects of the documented  
5 alcohol abuse, the ALJ found Plaintiff had the following physical  
6 residual functional capacity (RFC):

7 [He can] lift and carry 20 pounds occasionally, stand and  
8 walk two hours in an eight-hour workday, and sit six hours  
9 in an eight-hour workday. He can occasionally climb ramps  
10 and stairs, balance, stoop, kneel, crouch, and crawl. He  
11 can never climb ladders, ropes, and scaffolds. He needs  
12 to avoid concentrated exposure to hazards.

13 (Tr. 21.)

14 Regarding Plaintiff's mental RFC, the ALJ found "due to  
15 alcoholism, [Plaintiff] cannot sustain basic work activities eight  
16 hours per day and five days per week." *Id.* After discussing  
17 Plaintiff's testimony and symptom allegations, the ALJ found  
18 Plaintiff's statements regarding physical limitations attributable  
19 to his impairments were not credible. (Tr. 22.) In making  
20 credibility findings, the ALJ specifically referenced evidence in  
21 the record that reflects Plaintiff's "significant problems with  
22 alcohol abuse." (Tr. 23-24.) He also referenced affirmative  
23 evidence of malingering and exaggeration of symptoms. (Tr. 24.)  
24 Having found Plaintiff unable to sustain basic work activities due  
25 to alcohol abuse, the ALJ concluded Plaintiff could not perform past  
26 work or other jobs in the national economy and was, therefore,  
27 disabled. (Tr. 27.)

28 In the second sequential evaluation, without the effects of  
alcohol abuse, the ALJ found Plaintiff would still have the severe  
right knee impairment but no mental impairment. (Tr. 28.) He found

1 Plaintiff's impairment or combination of impairments without alcohol  
2 abuse would not meet the Listings. (*Id.*) At step four, ALJ  
3 Crickman determined that if Plaintiff stopped the alcohol abuse, he  
4 would have no mental limitations and the ability to perform  
5 sedentary to light work. (*Id.*) Considering a RFC without the  
6 effects of alcohol abuse and vocational expert testimony, the ALJ  
7 found if Plaintiff stopped abusing alcohol, he could perform his  
8 past work as an office worker and telephone solicitor. (Tr. 29.)  
9 Proceeding to step five, he found the ALJ could perform a full range  
10 of unskilled sedentary work, and was therefore not disabled. (*Id.*)  
11 He concluded Plaintiff's substance abuse is a "contributing factor  
12 material to disability," and therefore, Plaintiff has not been  
13 "disabled" as defined by the Social Security Act through the date of  
14 the decision. (Tr. 29-30.)

#### 15 STANDARD OF REVIEW

16 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
17 court set out the standard of review:

18 A district court's order upholding the Commissioner's  
19 denial of benefits is reviewed *de novo*. *Harman v. Apfel*,  
20 211 F.3d 1172, 1174 (9<sup>th</sup> Cir. 2000). The decision of the  
21 Commissioner may be reversed only if it is not supported  
22 by substantial evidence or if it is based on legal error.  
23 *Tackett v. Apfel*, 180 F.3d 1094, 1097 (9<sup>th</sup> Cir. 1999).  
24 Substantial evidence is defined as being more than a mere  
25 scintilla, but less than a preponderance. *Id.* at 1098.  
26 Put another way, substantial evidence is such relevant  
27 evidence as a reasonable mind might accept as adequate to  
28 support a conclusion. *Richardson v. Perales*, 402 U.S.  
389, 401 (1971). If the evidence is susceptible to more  
than one rational interpretation, the court may not  
substitute its judgment for that of the Commissioner.  
*Tackett*, 180 F.3d at 1097; *Morgan v. Commissioner of  
Social Sec. Admin.*, 169 F.3d 595, 599 (9<sup>th</sup> Cir. 1999).

The ALJ is responsible for determining credibility,  
resolving conflicts in medical testimony, and resolving  
ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9<sup>th</sup>  
Cir. 1995). The ALJ's determinations of law are reviewed

1 de novo, although deference is owed to a reasonable  
 2 construction of the applicable statutes. *McNatt v. Apfel*,  
 201 F.3d 1084, 1087 (9th Cir. 2000).

### 3 SEQUENTIAL EVALUATION PROCESS

4 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
 5 requirements necessary to establish disability:

6 Under the Social Security Act, individuals who are  
 7 "under a disability" are eligible to receive benefits. 42  
 8 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
 9 medically determinable physical or mental impairment"  
 10 which prevents one from engaging "in any substantial  
 11 gainful activity" and is expected to result in death or  
 12 last "for a continuous period of not less than 12 months."  
 13 42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
 14 from "anatomical, physiological, or psychological  
 15 abnormalities which are demonstrable by medically  
 16 acceptable clinical and laboratory diagnostic techniques."  
 42 U.S.C. § 423(d)(3). The Act also provides that a  
 claimant will be eligible for benefits only if his  
 impairments "are of such severity that he is not only  
 unable to do his previous work but cannot, considering his  
 age, education and work experience, engage in any other  
 kind of substantial gainful work which exists in the  
 national economy. . . ." 42 U.S.C. § 423(d)(2)(A). Thus,  
 the definition of disability consists of both medical and  
 vocational components.

17 In evaluating whether a claimant suffers from a  
 18 disability, an ALJ must apply a five-step sequential  
 19 inquiry addressing both components of the definition,  
 20 until a question is answered affirmatively or negatively  
 21 in such a way that an ultimate determination can be made.  
 22 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 claimant bears the burden of proving that [s]he is  
 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 detailed objective medical reports of h[is] condition from  
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 404.1512(a)-(b), 404.1513(d)).

23 It is the role of the trier of fact, not this court, to resolve  
 24 conflicts in evidence. *Richardson*, 402 U.S. at 400. If evidence  
 25 supports more than one rational interpretation, the court may not  
 26 substitute its judgment for that of the Commissioner. *Tackett*, 180  
 27 F.3d at 1097; *Allen v. Heckler*, 749 F.2d 577, 579 (9<sup>th</sup> Cir. 1984).  
 28 Nevertheless, a decision supported by substantial evidence will

1 still be set aside if the proper legal standards were not applied in  
2 weighing the evidence and making the decision. *Browner v. Secretary*  
3 *of Health and Human Services*, 839 F.2d 432, 433 (9<sup>th</sup> Cir. 1988). If  
4 there is substantial evidence to support the administrative  
5 findings, or if there is conflicting evidence that will support a  
6 finding of either disability or non-disability, the finding of the  
7 Commissioner is conclusive. *Sprague v. Bowen*, 812 F.2d 1226, 1229-  
8 1230 (9<sup>th</sup> Cir. 1987).

9 **SEQUENTIAL EVALUATION IN THE CONTEXT OF DRUG AND ALCOHOL ABUSE**

10 The Contract with America Advancement Act of 1996 (CAAA)  
11 amended the Social Security Act, providing that "an individual shall  
12 not be considered to be disabled . . . if alcoholism or drug  
13 addiction would . . . be a contributing factor material to the  
14 Commissioner's determination that the individual is disabled." 42  
15 U.S.C. § 423(d)(2)(C). Special statutes and regulations govern  
16 disability claims that involve substance abuse.

17 Under the Regulations implemented by the Commissioner, the ALJ  
18 must follow a specific analysis that incorporates the sequential  
19 evaluation discussed above. 20 C.F.R. §§ 404.1535(a), 416.935(a).  
20 The ALJ first must conduct the five-step inquiry without attempting  
21 to determine the impact of a substance abuse disorder. If the ALJ  
22 finds that the claimant is not disabled under the five-step inquiry,  
23 the claimant is not entitled to benefits, and there is no need to  
24 proceed with further analysis. *Id.* If the ALJ finds the claimant  
25 disabled, and there is evidence of substance abuse, the ALJ should  
26 proceed under the sequential evaluation and §§ 404.1535 or 416.935  
27 to determine if the claimant would still be disabled absent the  
28 substance abuse. *Bustamante v. Massanari*, 262 F.3d 949, 955 (9<sup>th</sup>

1 Cir. 2001). If found disabled with the effects of substance abuse,  
2 the claimant has the burden in steps one through four of the second  
3 sequential evaluation process to prove drug or alcohol abuse is not  
4 a contributing factor material to his disability. *Parra v. Astrue*,  
5 481 F.3d 742, 748 (9<sup>th</sup> Cir. 2007).

6 As stated by the *Parra* court, "An alcoholic claimant who  
7 presents inconclusive evidence of materiality has no incentive to  
8 stop drinking, because abstinence may resolve his disabling  
9 limitations and cause his claim to be rejected or his benefits  
10 terminated." *Id.* at 750. Thus, through the CAAA, Congress seeks  
11 "to discourage alcohol and drug abuse, or at least not to encourage  
12 it with a permanent government subsidy." *Id.* at 749; *Ball v.*  
13 *Massanari*, 254 F.3d at 817, 824 (9<sup>th</sup> Cir. 2001). Plaintiff must  
14 provide competent evidence of a period of abstinence and medical  
15 source opinions relating to that period sufficient to establish his  
16 alcoholism is not a contributing factor material to his alleged  
17 mental impairments and disability. *Parra*, 481 F.3d at 748-49.

#### 18 ISSUES

19 The question is whether the ALJ's decision is supported by  
20 substantial evidence and free of legal error. Plaintiff asserts he  
21 has presented substantial evidence that he is more limited  
22 physically and psychologically than determined by the ALJ.  
23 Specifically, he argues the ALJ erred when: (1) he improperly  
24 rejected the opinions of examining psychologist, M. Scott Mabee  
25 Ph.D., at step two; (2) he found Plaintiff did not have a severe  
26 mental impairment without the effects of alcohol; and (3) he  
27 improperly rejected the opinions of physician's assistant K. Michele  
28 Treece at step four when assessing Plaintiff's physical RFC. (ECF



1 No. 14 at 12-18.)

2 **DISCUSSION**

3 **A. Step Two Mental Impairments - With and Without Alcohol Abuse**

4 At step two of the sequential evaluation, the ALJ determines  
5 whether a claimant suffers from a "severe" impairment, *i.e.*, one  
6 that significantly limits his physical or mental ability to do basic  
7 work activities. 20 C.F.R. §§ 404.1520, 416.920(c). To satisfy  
8 step two's requirement of a severe impairment, the claimant must  
9 prove the existence of a physical or mental impairment by providing  
10 medical evidence consisting of signs, symptoms, and laboratory  
11 findings; the claimant's own statement of symptoms alone will not  
12 suffice. 20 C.F.R. §§ 404.1508, 416.908. In addition, the  
13 impairment must last, or be expected to last, for a continuous  
14 period of at least 12 months. 20 C.F.R. §§ 404.1509, 416.909  
15 (durational requirement). The fact that a medically determinable  
16 condition exists does not automatically mean the symptoms are  
17 "severe," or "disabling" as defined by the Social Security  
18 regulations. *See, e.g., Edlund*, 253 F.3d at 1159-60; *Fair v. Bowen*,  
19 885 F.2d 597, 602-03 (9<sup>th</sup> Cir. 1989); *Key v. Heckler*, 754 F.2d 1545,  
20 1549-50 (9<sup>th</sup> Cir. 1985).

21 A mental impairment generally is considered not severe if the  
22 degree of limitation in the functional areas of activities of daily  
23 living; social functioning; and concentration, persistence or pace  
24 is rated as "none" or "mild" and there have been no episodes of  
25 decompensation. 20 C.F.R. §§ 404.1520a(d)(1), 416.920a(d)(1).

26 As discussed above, where drug or alcohol abuse is a  
27 consideration, the Commissioner must evaluate mental impairments  
28

1 with and without the effects of substance abuse in the step two  
2 analysis. *Bustamante*, 262 F.3d at 955. Where disabling mental  
3 impairments are established with the effects of substance abuse the  
4 "claimant bears the burden of proving that drug or alcohol addiction  
5 is not a contributing factor to his disability." *Parra*, 481 F.3d at  
6 748.

7 In determining whether a claimant's impairments are severe at  
8 step two, the ALJ evaluates medical evidence submitted and explains  
9 the weight given to the opinions of acceptable medical sources in  
10 the record. *Social Security Ruling (SSR)* 85-28. If the medical  
11 source is an examining or treating physician, the Commissioner must  
12 provide "clear and convincing" reasons for rejecting an  
13 uncontradicted opinion. *Benecke v. Barnhart*, 379 F.3d 587, 592 (9<sup>th</sup>  
14 Cir. 2004); *Lester v. Chater*, 81 F.3d 821, 830 (9<sup>th</sup> Cir. 1995). If  
15 the opinion is contradicted, it can only be rejected for specific  
16 and legitimate reasons that are supported by substantial evidence in  
17 the record. *Andrews*, 53 F.3d at 1043. Where a medical source  
18 opinion is based primarily on a claimant's self-reported symptoms,  
19 credibility is an appropriate factor to consider in the evaluation  
20 of medical evidence at step two. *Webb v. Barnhart*, 433 F.3d 683,  
21 687 (9<sup>th</sup> Cir. 2005).

#### 22 **1. Medical Evidence of Mental Impairment**

23 Here, medical evidence shows that in January 2006, Dr. Scott  
24 Mabee examined Plaintiff and diagnosed mental disorder, NOS, due to  
25 general medical condition - cranial bleeding (patient reported) and  
26 personality disorder, NOS. His opinions were based on an interview,  
27 mini-mental status exam, and psychological testing. No prior  
28

1 records were reviewed, and Dr. Mabee made no mention of significant  
2 or ongoing alcohol abuse. Plaintiff reported he had a history of  
3 alcohol abuse, but "drinks socially on a limited basis." (Tr. 402,  
4 404, 406.) In his narrative report, Dr. Mabee opined that "it was  
5 very possible that Mr. Hardwick may well experience difficulty with  
6 his memory and cognitive functioning, given his self-reported  
7 history of cranial injuries." (Tr. 406.) In the summary evaluation  
8 form, Dr. Mabee assessed moderate cognitive and social functional  
9 limitations, which he estimated would persist for six to twelve  
10 months. (Tr. 402-03.) Given Plaintiff's self-report of brain  
11 trauma, Dr. Mabee recommended a neurological evaluation. (Tr. 03.)

12 In March 2007, Plaintiff was examined by Dr. Charles Brondos,  
13 neurologist. (Tr. 361-66.) Dr. Brondos reported Plaintiff had a  
14 "significant history of alcohol abuse," and demonstrated memory  
15 problems in his mini-mental status exam. (Tr. 361-62.) He noted  
16 Plaintiff had had a "significant head injury in the past with a  
17 hemorrhage," but a review of imaging reports from December 2006  
18 showed resolution of the hemorrhage and some cerebral and cerebellar  
19 atrophy. (Tr. 361.) Dr. Brondos opined Plaintiff's cerebellar  
20 atrophy was "presumably from alcohol use," and recommended a  
21 neuropsychological evaluation to assess the alleged memory problems.  
22 (Tr. 362.)

23 After the November 2007 hearing, the ALJ ordered a  
24 psychological evaluation from Psychological Services Spokane to  
25 assess Plaintiff's alleged memory deficits, reported seizure  
26 disorder, and alcohol addiction. (Tr. 644, 461-74.) In May 2008,  
27 Plaintiff completed a personal information form and was interviewed  
28

1 and given a mini mental status exam by Frank Rosekrans, Ph.D. *Id.*  
2 Dr. Rosekrans also administered and interpreted several objective  
3 tests to assess neurological and intellectual functioning. *Id.* Dr.  
4 Rosekrans reported test scores and self-report evidenced  
5 exaggeration of symptoms, malingering, and misrepresentation of  
6 alcohol use. (Tr. 26, 468-69.) He opined that even with invalid  
7 scores, intelligence tests did not indicate borderline intelligence,  
8 memory impairment or mental functional limitation due to  
9 neurological impairment. Regarding the diagnosed personality  
10 disorder, Dr. Rosekrans found, "It would be highly unusual to  
11 develop disabling personality disorders after 9 years of successful  
12 work." (Tr. 469.) He concluded most of Plaintiff's disabilities  
13 were alcohol-related, but he did not find "any serious impairment of  
14 ability to work." (Tr. 25, 469.)

## 15 **2. Evaluation of Dr. Mabee's Psychological Evaluation**

16 Citing evidence from Dr. Brondos' March 2007 neurological  
17 evaluation, Plaintiff argues the ALJ erred in rejecting Dr. Mabee's  
18 January 5, 2006, diagnoses of personality disorder, NOS and "mental  
19 disorder, NOS, due to cranial bleeding (patient reported)." (ECF No.  
20 14 at 13.) He asserts that if properly credited, Dr. Mabee's  
21 evidence would establish a severe mental impairment, requiring  
22 reversal of the ALJ's decision and remand. (*Id.* at 15-17.)  
23 However, review of the record in its entirety shows the ALJ properly  
24 explained the weight given to Dr. Mabee's report and gave legally  
25 sufficient reasons for rejecting his diagnoses.

26 At step two, the ALJ summarized the medical evidence submitted  
27 and specifically addressed Dr. Mabee's diagnoses. He found  
28

1 Plaintiff's documented hemorrhage due to head injury did not last  
2 for 12 months and was, therefore, non-severe. (Tr. 17.) This  
3 finding is supported by Dr. Brondos' report and CT imaging reports.  
4 (Tr. 361.) The ALJ also discounted Dr. Mabee's diagnoses of  
5 personality disorder NOS and mental disorder NOS due to "bleeding in  
6 the brain," and explained his rejection of Dr. Mabee's opinions with  
7 these reasons: (1) psychological testing by Dr. Rosekrans revealed  
8 no organic mental disorder; (2) a CT scan in December 2006 of the  
9 brain showed a resolution of Plaintiff's brain hemorrhaging; (3) Dr.  
10 Mabee failed to diagnose or factor in evidence of ongoing alcohol  
11 abuse in his evaluation; and (4) opinions based on Plaintiff's self-  
12 report were unreliable due to a documented pattern of over-reporting  
13 of symptoms and misrepresentations. (Tr. 17-18, 24, 25-26.) These  
14 are specific, legitimate reasons for disregarding the Dr. Mabee's  
15 opinions.<sup>2</sup> *Lingenfelter v. Astrue*, 504 F.3d 1028, 1044-45 (citing  
16 *Thomas v. Barnhart*, 278 F.3d 947, 957 (9<sup>th</sup> Cir. 2002)); *Flaten v.*  
17 *Secretary of Health and Human Serv.*, 44 F.3d 1453, 1463-64 (9<sup>th</sup> Cir.  
18 1995); *Fair*, 885 F.2d at 604.

19 It also is noted on independent review that Dr. Mabee did not  
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21 <sup>2</sup> ALJ Crickman gave "clear and convincing" reasons for finding  
22 Plaintiff's statements were not fully credible, including his  
23 documented lack of candor regarding ongoing alcohol abuse and  
24 clinical evidence of exaggerated symptoms and malingering in  
25 psychological evaluations. (Tr. 23-24, 26); see *Verduzco v. Apfel*,  
26 188 F.3d 1087, 1090 (9<sup>th</sup> Cir. 1999) (claimant's inconsistencies and  
27 lack of candor about substance abuse support adverse credibility  
28 finding); *Morgan*, 169 F.3d at 599.

1 have psychological or medical records to review as part of his  
2 examination. (Tr. 404.) The ALJ is not obliged to credit medical  
3 opinions that are unsupported by the medical source's own data  
4 and/or contradicted by opinions of other examining medical sources.  
5 *Tommasetti v. Astrue*, 533 F.3d 1035, (9<sup>th</sup> Cir. 2008); *Thomas*, 278  
6 F.3d at 957; *Matney v. Sullivan*, 981 F.2d 1016, 1019 (9<sup>th</sup> Cir. 1989).  
7 Further, when there is conflicting medical evidence, it is the ALJ's  
8 responsibility to interpret the evidence in its entirety and resolve  
9 the conflict. *Thomas*, 278 F.3d at 957. In this case, the ALJ  
10 reasonably relied on the May 2008 testing results and opinions of  
11 Dr. Rosekrans, who had the advantage of a longitudinal review of  
12 medical records, emergency room reports of treatment for acute  
13 intoxication, objective psychological test results, an extensive  
14 interview and a mini-mental status exam upon which to base his  
15 conclusions. (Tr. 27, 462-74.)

16 Plaintiff's argument that Dr. Mabee's two-hour interview with  
17 Plaintiff renders his diagnoses valid is without merit. (ECF No. 14  
18 at 16.) As discussed above, Plaintiff's self-report was found not  
19 credible, and psychological testing indicated malingering. (Tr. 23-  
20 24, 26.) Dr. Mabee's own report noted elevated scores in  
21 psychological testing indicating the possibility of false mental  
22 health claims and invalid data. (Tr. 405-06.) Medical opinions  
23 based on a claimant's subjective complaints are properly rejected as  
24 unreliable where the claimant's credibility has been properly  
25 discounted. *Tonapetyan v. Halter*, 242 F.3d 1144, 1149 (9<sup>th</sup> Cir.  
26 2001). In addition, as noted by the ALJ in his credibility  
27 findings, emergency room reports in the record (unreviewed by Dr.

1 Mabee and unreported by Plaintiff in the interview) document  
2 treatment for acute intoxication in November 2005, less than two  
3 months prior to Dr. Mabee's evaluation. (Tr. 229-38.) Conclusions  
4 based on Plaintiff's unreliable self-report during a two hour  
5 interview are insufficient to support step two findings of severe  
6 mental impairments. 20 C.F.R. §§ 404.1508, 416.908.

7 The ALJ gave legally sufficient reasons for rejecting Dr.  
8 Mabee's diagnoses and giving little weight to his opinions. The  
9 medical evidence in its entirety does not support Dr. Mabee's  
10 conclusion that Plaintiff was impaired mentally by a past head  
11 injury or a personality disorder.

### 12 **3. Alcohol Abuse as a Contributing Factor**

13 Even assuming Plaintiff established severe mental impairments  
14 of personality disorder NOS or memory problems in addition to the  
15 disabling alcohol abuse disorder found at step two of the first  
16 sequential evaluation, he has failed to meet his burden to show his  
17 mental impairments are not caused by the severe chronic alcohol  
18 abuse reflected throughout the medical record. *Parra*, 481 F.3d at  
19 748. During the relevant time, examining medical sources noted  
20 acute alcohol intoxication, self-reported daily alcohol abuse, and  
21 impairments caused or exacerbated by alcohol abuse. (Tr. 174, 237-  
22 38, 362, 363, 463-64, 501.) For example, Drs. Brondos and Rosekrans  
23 referenced Plaintiff's alcohol abuse and opined his mental and  
24 psychological problems were alcohol-related. (Tr. 361-62, 469.) In  
25 March 2007, Dr. Arnold noted Plaintiff's chronic alcoholism, and  
26 Plaintiff's self-report of recent inpatient and current outpatient  
27 treatment. (Tr. 363, 365.) Emergency room reports document repeated

1 hospitalizations due to acute alcohol intoxication in 2005, 2006,  
2 2007, and 2008.<sup>3</sup> (Tr. 229-38, 438, 487, 480-99, 501, 567.) Because  
3 Plaintiff has failed to provide evidence of prolonged abstinence or  
4 severe mental impairments without the effects of the undisputed  
5 alcohol abuse that limit his ability to work, he did not meet his  
6 burden at step two. *Parra*, 481 F.3d at 748. The ALJ did not err  
7 in his step two evaluation and findings that without the effects of  
8 alcohol abuse Plaintiff did not have a severe mental impairment.

9 **B. Physical RFC Without the Effects of Alcohol Abuse**

10 An RFC determination represents the most a claimant can still  
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12 <sup>3</sup> After the ALJ rendered his decision, Plaintiff submitted  
13 medical records regarding emergency room visits between August 30,  
14 2007, and September 28, 2008, when he was treated for injuries  
15 sustained in a pedestrian-automobile accident. (Tr. 480-594.) These  
16 records were considered by the Appeals Council (Tr. 7) and are part  
17 of the record on review. *Gomez v. Chater*, 74 F.3d 967, 971 (9th  
18 Cir. 1996). Emergency room reports reflect Plaintiff was found  
19 intoxicated under a bridge on August 30, 2008, and taken to the  
20 hospital for evaluation. The attending physician opined his  
21 subarachnoid hemorrhage was related to acute alcohol intoxication.  
22 (Tr. 571.) On September 6, 2008, Plaintiff was admitted to ER from  
23 detox and diagnosed with acute alcohol intoxication. (Tr. 567.)  
24 On September 28, 2008, Plaintiff was admitted to ER after being hit  
25 by a car. At intake, he self-reported drinking alcohol daily. (Tr.  
26 487.) These records support the ALJ's finding that chronic alcohol  
27 abuse is a contributing factor material to the determination of  
28 disability. (Tr. 29.)



1 do despite his physical and mental limitations. 20 C.F.R. §§  
2 404.1545, 416.945. The RFC assessment is not a "medical issue"  
3 under the Regulations; it is based on all relevant evidence in the  
4 record, not just medical evidence. *Id.* At step four of the  
5 sequential evaluation without the effects of alcohol abuse, the ALJ  
6 determined Plaintiff had no mental impairments and the following  
7 physical limitations:

8       If the claimant stopped the substance use, the  
9 claimant would have the residual functional capacity to  
10 lift and carry 20 pounds occasionally and 10 pounds  
11 frequently, stand and walk two hours in an eight-hour  
12 workday, and sit six hours in an eight-hour workday. He  
could occasionally climb ramps and stairs, balance, stoop,  
kneel, crouch, and crawl. He could never climb ladders,  
ropes and scaffolds. He would have to avoid concentrated  
exposure to hazards.

13 (Tr. 28.)

14       Plaintiff argues this physical RFC is not supported by  
15 findings in a September 2005 physical evaluation signed by Dr. Craig  
16 Bone, Plaintiff's orthopedic surgeon, and Michele Treece,  
17 physician's assistant. (ECF No. 14 at 17; Tr. 399.) He contends  
18 the ALJ's reasons are not adequate to reject the opinions of Dr.  
19 Bone and must be credited. He further contends remand is warranted  
20 for additional vocational expert testimony based on a new RFC. (ECF  
21 No. 14 at 18.) Assuming the opinions at issue are those of Dr. Bone  
22 as well as Ms. Treece, the ALJ must give "specific" and "legitimate"  
23 reasons for discounting them.<sup>4</sup> *Lester*, 81 F.3d at 830-31. The ALJ

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25       <sup>4</sup> These opinions are contradicted by a physical RFC assessment  
26 by agency reviewing physicians; therefore, the specific and  
27 legitimate standard applies. (See Tr. 203-10.) A non-examining  
28 physician opinion is substantial evidence if supported by other

1 may meet his burden by "setting out a detailed and thorough summary  
2 of the facts and conflicting clinical evidence, stating his  
3 interpretation thereof, and making findings." *Magallanes v. Bowen*,  
4 881 F.2d 747, 751 (9<sup>th</sup> Cir. 1989) (*quoting Cotton v. Bowen*, 799 F.2d  
5 1403, 1408 (9<sup>th</sup> Cir. 1986) (*superseded by statute on other grounds*).  
6 However, when rejecting a medical opinion, the adjudicator is not  
7 required to recite specific words. The Ninth Circuit has held the  
8 reviewing court can read the adjudicator's summary of the evidence  
9 and findings and draw specific and legitimate inferences based on  
10 substantial evidence. *Magallanes*, 881 F.2d at 755.

11 The record shows that on June 1, 2005, one month after  
12 performing a total knee replacement on Plaintiff, Dr. Bone opined  
13 Plaintiff was severely limited due to his recent surgery. (Tr. 394.)  
14 Dr. Bone expected this level of limitation to last four months,  
15 noting Plaintiff needed "at least 3 months of rehab prior to being  
16 released for *light work* activities." (Tr. 395.) (*Emphasis added.*)  
17 Following up three months later, Ms. Treece and Dr. Bone revised the  
18 work level limitation to "sedentary level," and reported this  
19 limitation was expected to last two to four months. (Tr. 398-99.)

20 ALJ Crickman specifically addressed Dr. Bone's work level  
21 opinions in his RFC findings. (Tr. 25.) He discounted Dr. Bone's  
22 opinion that Plaintiff was severely limited, explaining this  
23 restriction was assessed "only one month after claimant's right knee  
24 replacement." (Tr. 25.) Consistent with Dr. Bone's expectation  
25 that the limitation would last four months, the ALJ found this

26 \_\_\_\_\_  
27 medical evidence in the record. SSR 96-6p.

1 limitation: (1) did not reflect current functioning, (2) was not  
2 consistent with post-operative medical records reflecting functional  
3 improvement over time, and (3) was not consistent with Plaintiff's  
4 reported activities. (*Id.*) These are specific and legitimate  
5 reasons for discounting a treating source opinion. *See Morgan*, 169  
6 F.3d at 602.

7 The ALJ also discounted the September 2005 evaluation, which  
8 the ALJ attributed to Ms. Treece. (Tr. 25.) Under the regulations,  
9 Ms. Treece is not an acceptable medical source and, therefore, is  
10 not qualified to diagnose an impairment. 20 C.F.R.  
11 §§ 404.1513(a), (d)(4), 416.913(a), (d)(4); SSR 06-03p. However, her  
12 opinions regarding how Plaintiff's impairments affect his ability to  
13 work must be considered and may be rejected only with specific,  
14 "germane" reasons. *Lewis v. Apfel*, 236 F.3d 503, 511 (9<sup>th</sup> Cir.  
15 2001); *Nguyen v. Chater*, 100 F.3d 1462, 1467 (9<sup>th</sup> Cir. 1996). Ms.  
16 Treece opined Plaintiff was restricted to sedentary work for two to  
17 four months. (Tr. 39-40.) The ALJ gave some weight to this opinion  
18 because it was four months after surgery, but he found Plaintiff's  
19 reported activities indicated he was capable of sedentary to light  
20 work. (Tr. 25.) This is a specific, germane reason for the weight  
21 given under the "other source" standard.

22 Assuming the sedentary limitation is Dr. Bone's opinion, this  
23 reason also is legally sufficient to reject a treating source  
24 opinion. *Morgan*, 169 F.3d at 602 (claimant's demonstrated activities  
25 inconsistent with treating psychologist's rejected opinions).  
26 Assuming *arguendo* that this one reason is not legally sufficient to  
27 reject the opinion of a treating specialist, any error is harmless.

1 See *Johnson v. Shalala*, 60 F.3d 1428, 1436 n.9 (9<sup>th</sup> Cir. 1995) (error  
2 is harmless when the correction of that error would not alter the  
3 result).

4 First, the ALJ need only explain why "significant probative  
5 evidence has been rejected." *Vincent v. Heckler*, 739 F.2d 1393,  
6 1395 (9<sup>th</sup> Cir. 1984). As discussed above, the September 2005 report  
7 specifically stated the limitation to sedentary work would continue  
8 two to four months, i.e., until January 2006, after which  
9 Plaintiff's ability to work should be re-evaluated. (Tr. 399.)  
10 Therefore, the sedentary limitation assessed by Ms. Treece was not  
11 intended to apply to Plaintiff's ability to work for the entire  
12 alleged period of disability. As explained by the ALJ in his  
13 discussion of the June 2005 report, the record shows Plaintiff was  
14 showing improvement by October 2005, when x-rays indicated a well-  
15 aligned prosthesis and intact femur, tibia and fibula shafts. By  
16 November 2005, Plaintiff could ambulate without significant  
17 difficulty, had full range of motion, a normal sensory examination  
18 and "normal muscle strength in the lower extremities." (Tr. 22,  
19 226, 236.)

20 In his summary of the evidence, the ALJ also referenced reports  
21 that in December 2005, Plaintiff exhibited good movement in his  
22 right leg and no edema; in July 2006, Plaintiff reported he was  
23 doing fine and his examining physician noted no evidence of joint  
24 laxity and no limp in Plaintiff's gait; and emergency room reports  
25 reflect left knee mobility and flexion through June 2007. (Tr. 22-  
26 23, 422, 432-33, 435.) In addition, the ALJ noted Plaintiff's  
27 September 2005 Daily Activities report completed two days before Ms.  
28

1 Treece's evaluation, in which Plaintiff self-reported an ability to  
2 lift up to 40 pounds, walk up to a quarter of a mile, and perform  
3 many daily activities. (Tr. 23, 95.) The self-reported abilities  
4 are consistent with the RFC assessment confirmed by agency reviewing  
5 physician, Howard Platter, M.D., on February 9, 2006. (Tr. 203-10.)  
6 Thus, even if the September 2005 post-operative opinion limiting to  
7 Plaintiff to sedentary work through January 2006 were credited  
8 fully, the evidence in its entirety supports ALJ's RFC finding that  
9 Plaintiff could perform sedentary to light work.

10 Substantial evidence supports the weight given Ms. Treece's  
11 opinion that Plaintiff was restricted to sedentary level work for a  
12 period of two to four months. Any error in the ALJ's explanation of  
13 the weight given this opinion is harmless, because the correction of  
14 the error would not alter the final determination of non-disability.  
15 The ALJ's summary of the evidence and RFC findings without the  
16 effects of alcohol abuse reflect a rational interpretation of the  
17 record in its entirety.

#### 18 CONCLUSION

19 The Commissioner's denial of benefits is supported by  
20 substantial evidence and without legal error. Plaintiff did not  
21 meet his burden of proving that he is disabled absent the effects of  
22 alcohol abuse. Accordingly,

#### 23 IT IS ORDERED:

- 24 1. Plaintiff's Motion for Summary Judgment (**ECF No. 13**) is  
25 **DENIED;**  
26 2. Defendant's Motion for Summary Judgment (**ECF No. 15**) is  
27 **GRANTED;**

1 3. Judgment shall be entered for Defendant.

2 The District Court Executive is directed to file this Order and  
3 provide a copy to counsel for Plaintiff and Defendant and the file  
4 shall be **CLOSED**.

5 DATED May 4, 2011.

6  
7 S/ CYNTHIA IMBROGNO  
8 UNITED STATES MAGISTRATE JUDGE  
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